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- II. Components of the Biological Assessment
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THE FOLLOWING SECTIONS WERE DELETED FROM THE ORIGINAL DOCUMENT:

- IV. Washington State Species List and Attachment B
- Common Flaws in Developing an Effect Determination
- Section 7 Guidance for Selected Species
- Section 7 Regulations (50 CFR Part 402)
- Recommended Reading

ENDANGERED SPECIES ACT OVERVIEW

SECTION 2 – Findings, Purposes, and Policy

- (a) Congress finds that various species of fish, wildlife, and plants in the U.S. have been rendered extinct as a result of economic growth and development;

Other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

These species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

Encourage the States and other interested parties through Federal financial assistance and a system of incentives to develop and maintain conservation programs to safeguard the Nation's heritage in fish, wildlife, and plants.

- (b) It is the purpose of the Act to provide a means whereby ecosystems upon which endangered and threatened species depend may be conserved and to provide a program for the conservation of such endangered and threatened species.
- (c) It is the declared policy of Congress that all Federal departments and agencies shall utilize their authorities to conserve (recover) listed species.

SECTION 3 – Definitions

SECTION 4 – Listing

- (a) (1) The Secretary shall determine whether any species is an endangered species or a threatened species based on any of the following factors:
- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
 - (B) over utilization for commercial, recreational, scientific, or educational purposes;
 - (C) disease or predation;
 - (D) the inadequacy of existing regulatory mechanisms; or
 - (E) other manmade factors affecting its continued existence.
- (b) (1)(A) The Secretary shall make determinations on the basis of the best scientific and commercial data available.
- (2) The Secretary shall designate critical habitat where appropriate, for listed species.
- (3) Petitions

(4) Listing Regulation

(5) Emergency Listing

- (c) (1) Requires the Secretary to maintain lists of threatened, endangered, and candidate species.
(2) Requires review of the status of each species on lists at least every 5 years.
- (d) Allows for the promulgation of regulations to provide for the protection and conservation of listed species. May allow for the take of a threatened species.
- (e) Allows for the protection of a non-listed species because of a close resemblance to listed species (“similarity of appearance”).
- (f) Requires the Secretary to develop and implement recovery plans for the conservation and survival of listed species.
 - (1) Establishes priority to those species most likely to benefit from a plan or those species in high threat from development activities.
 - (2) Directs the Secretary to appoint recovery teams to prepare recovery plans.

SECTION 5 – Land Acquisition

Directs the Secretaries of Interior and the Secretary of Agriculture, with respect to the National Forest System, to establish and implement a program to conserve fish, wildlife, and plants.

Makes funds available through the Land and Water Conservation Fund Act of 1965.

SECTION 6 – Cooperation with the States

Authorizes the Secretary to enter into a cooperative agreement with any state to establish and maintain a program for the conservation of listed species.

Provides funds for state conservation programs at 75% Federal and 25% state costs.

Allows the state to take listed species in conjunction with its conservation program.

SECTION 7 – Interagency Cooperation

- (a) (1) provides that all Federal agencies utilize their authorities to carry out programs for the conservation of listed species.
(2) Prohibits any Federal agency from carrying out any action that is likely to jeopardize the continued existence of any listed species. It further requires federal agencies to consult with the Fish and Wildlife Service on actions that are authorized, funded, or carried out by such agencies, which may affect listed species (flow chart).

Requires Federal agencies to prepare a biological assessment for major Federal actions.

Prohibits Federal agencies or Federal permit or license applicants from making any irreversible or irretrievable commitment of resources once Section 7 Consultation has been initiated.

Establishes the Endangered Species Exemption Committee, known as the “God squad” (seven members, one each from Department of Agriculture, Department of the Army, Council of Economic Advisors, EPA, Department of Interior, NOAA, and a Presidential appointee from the affected state).

Establishes a process for exempting specific actions from the provisions of Section 7. Requires the Federal agency to complete the Section 7 process and receive a jeopardy opinion.

The Committee shall make its decision within 30 days and grant an exemption if supported by a vote of not less than five of its members.

SECTION 8 – International Cooperation

Encourages foreign countries to provide for the conservation of fish, wildlife and plants, including listed species.

Establishes the Convention of International Trade of Endangered Species of fauna and flora (CITES). Develop lists (appendices) of species of mammals and plants that are to be controlled by import and export laws.

SECTION 9 – Prohibited Acts

(a) Prohibits the take of listed species without special permit (“take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect or the attempt to engage in such activities). Also prohibited are the import and export of listed species from the United States and the sale and interstate transport of listed species.

SECTION 10 – Exceptions

(a)(1) (A) Authorizes the Secretary to issue permits allowing for take for scientific purposes or for the propagation or survival of listed species.

(B) Authorizes the incidental take of listed species by permit with an approved Habitat Conservation Plan.

(j) Exempts Experimental Populations from the provisions of Section 9 and allows for take by special regulation.

SECTION 11 – Penalties and Enforcement

(a) and (b) Persons convicted of violating provisions of the Act may be subject to a maximum of \$25,000 under civil penalties or up to \$50,000 and/or one year in prison under criminal penalties.

COMPONENTS OF THE BIOLOGICAL ASSESSMENT

Purpose

To evaluate effects of project on listed/proposed species or critical habitat.

To determine the need for consultation/conference.

To achieve compliance with the Endangered Species Act and National Environmental Policy Act.

Overview

- 1) A biological assessment is required for major construction activities under Section 7(c) of the ESA. A major construction activity is defined as a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in NEPA (42 USC 4332(2)(c)).
- 2) Biological assessments are recommended for all other Federal activities (actions that are authorized, funded or carried out by a Federal agency).
- 3) The biological assessment provides the analysis of project impacts to listed and proposed species/critical habitat that are likely to be found in the project area (candidate species are optional).
- 4) The assessment may be completed as a section of a NEPA document or prepared as a stand-alone document.
- 5) A Federal agency is not required to prepare a biological assessment if only proposed species or proposed critical habitat may occur within a project area. However, should the listing/designation become final, the biological assessment would be required.
- 6) If both listed and proposed species/critical habitat may occur within a project area, each must be considered in the biological assessment as required by Section 7(c) of the Act.
- 7) Biological assessments should be started within 90 days of receipt of a species list. If not, the list should be verified with the Service, via phone.
- 8) Biological assessments are to be completed within 180 days of receipt of a species list and prior to construction or contract.
- 9) If an applicant is involved, the 180-day period may not be extended unless the agency provides to the applicant, before the end of the 180-day period, a written statement explaining the reason for the extension and the estimated time of the extension. However, the applicant has no input on whether or not the time period is extended. The time extension for a biological assessment is the prerogative of the Federal agency.
- 10) Within 30 days of receipt of a biological assessment prepared in accordance with Section 7(c), the Service will respond in writing as to whether or not to concur with the Federal agency's finding.
- 11) A biological assessment must be completed if the agency applies for an exemption to the

requirements of Section 7(a)(2).

- 12) When a proposed action requiring the preparation of a biological assessment is identical, or very similar to, previous actions for which a biological assessment was prepared, the Federal agency may fulfill its biological assessment requirement by incorporating, by reference, the earlier biological assessment. The agency should provide this information in writing, plus any supporting data that are pertinent to the consultation. The agency should also certify that:
 - A) The proposed action involves similar impacts to the same species in the same geographic area;
 - B) No new species or critical habitat have been listed, designated, or proposed for the action area; and
 - C) The biological assessment has been supplemented with relevant changes in information.
- 13) The contents of a biological assessment should be commensurate with the effects of the action. Congress has allowed for flexibility in the contents of an assessment by not requiring strict standards or formats.
- 14) The biological assessment is used as the “eyes and ears” of the Service. While we will make every attempt to visit project sites, excessive workloads often make this impossible. Therefore, the assessment should be complete and as clear as possible.

PRE-ASSESSMENT

Species List Requests

- 1) Required for major construction activities.
- 2) Not required, but may be requested for other Federal activities.
- 3) Must be requested (in writing) by the Federal agency or its designated non-Federal representative (applicant or consultant) or... a list of species may be provide to the Fish and Wildlife Service for written concurrence.
- 4) A brief project description, location (township, range and section) and map must be included with the request.
- 5) The Service will respond to species list requests within 30 days of their request.
- 6) The list will include all listed and proposed species/critical habitat and candidate species that may occur within the project area.
- 7) Enclosed with the species list will be biological assessment guidance.

BIOLOGICAL ASSESSMENT CONTENT

Project Description

- 1) Provide the location of the proposed activity including state, county and township, range and section.
- 2) Provide a map of the project vicinity with the boundary of the proposed activity depicted. A Xerox copy would be adequate. Photographs may be helpful in certain circumstances.
- 3) Provide a detailed description of the proposed activity, including secondary project features such as access roads, power lines etc.
- 4) Describe construction and operation activities and the expected timing of these activities if known.

Site Specific Information

- 1) Identify listed, proposed and candidate species that are known to or thought to occur on site or within the project vicinity. Descriptions of the life history of these species are not necessary for the assessment.
- 2) Provide a description of the habitat for the species found on site and within the project vicinity that would potentially be affected by the action.
- 3) Provide a description of survey methods and survey results of listed, proposed or candidate species or their habitat that were conducted within the vicinity of the project areas.
- 4) Provide information obtained from local biologists that are familiar project areas and species in question.

Effects of the Action

Direct and indirect effects:

- 1) Describe and analyze the effects of the action that would directly effect the species. For example, actions that would immediately remove or destroy habitat or displace animal or plants etc.
- 2) Describe and analyze the effects of the action that would indirectly affect the species. For example, address effects to individuals or habitat that would occur later in time. Actions that would effect a species food supply.

Interdependent and interrelated effects:

- 1) Describe and analyze the effects of interdependent actions. These are actions that have no independent utility apart from the primary action. Examples of interdependent actions for a timber sale include the

- construction, maintenance, and use of a road required to access the sale area.
- 2) Describe and analyze the effects of interrelated actions. These are actions that are part of the primary action and dependent upon that primary action for their justification. Examples of interrelated activities for a timber sale include the post timber harvest activities such as slash burning, site preparation, planting and brush control.

Both the interdependent and interrelated activities are assessed by applying the “but for” test, which asks whether any action and its associated impacts would occur “but for” the action.

Cumulative effects:

- 1) Describe and analyze the effects of actions that are cumulative to the primary action. Cumulative effects include the effects of unrelated future state or private activities, not involving Federal activities, that are reasonably certain to occur* within the project area. An example of an action that could be considered cumulative to the primary action would be a future housing development located adjacent to the Federal activity of building a highway. Care should be taken to assure that the development would not involve Federal authorization or funding.

* A future activity is “reasonably certain to occur” if it is likely to occur considering economic, administrative, or legal hurdles; implementation of the activity need not be guaranteed.

Any research findings that are use in the analysis of the effects of an action should be cited. This adds to the credibility of the analysis.

Incidental Take

- 1) Every effort should be expended to assess whether or not take of a listed species is likely to result from a proposed activity. Numbers of individuals likely to be taken should be provided.
- 2) Take as defined in Section 3(18) of the Act means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”
- 3) Incidental take is defined in Section 10(a)(1)(B) of the Act means “Any taking otherwise prohibited by Section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”
- 4) Take may occur only to individuals of a species, not to a species’ habitat or to designated critical habitat. The take prohibition does not extend to proposed or candidate species.

Conservation Measures

- 1) Conservation measures are actions that, when implemented by the Federal agency or applicant, would reduce or eliminate the adverse impacts of the proposed activity.
- 2) Conservation measures may be minor alterations in the proposed activity such as timing restrictions,

access closures, or changes in project features or location. The measures should be as specific as possible.

- 3) Conservation measures may be developed with the assistance of the Service with the objective of reducing significant project impacts. These measures would assist in compliance under the Act through the informal section 7 process.

Determination of Effect

- 1) The finding or determination of effect is the conclusion of the assessment and indicates the overall effect of the proposed activity to listed species or critical habitat. This finding must be supported by the documentation presented in the biological assessment.
- 2) The finding of effect may only be made by the Federal agency. A recommended finding may be presented to the Federal agency by the non-Federal representative.
- 3) The Federal agency may make only one of the following effects determinations:
 - Beneficial effect
 - No effect
 - May affect, not likely to adversely affect
 - May affect, likely to adversely affect
- 4) Findings of “beneficial effect” must be presented to the Service for written concurrence and (at the discretion of the Service) possible formal consultation.
- 5) Findings of “no effect” do not require written concurrence from the Service. However, we routinely request copies of no effect assessments for our files. Written concurrence from the Service for no effect determinations will be provided on request.
- 6) Findings of “not likely to adversely affect” may be provided for projects that may affect a listed species, but the impacts are likely to be insignificant or discountable. This conclusion is usually reached through the informal consultation process and requires written concurrence from the Service.
- 7) A finding of “likely to adversely affect” would be appropriate for actions that have significant effects to listed species, and for which no conservation measures are available to significantly reduce or eliminate project impacts. This finding requires the Federal agency to initiate formal section 7 consultation under the Act. A written request for formal consultation should accompany the biological assessment.
- 8) Similar finding of effects are to be made for designated critical habitat.
- 9) Findings of “no jeopardy” or “jeopardy” are required by the Federal agency for project impacts related to proposed species or proposed critical habitat. The Service is available to assist the Federal agency with this determination of effect. Conference is required for “jeopardy” findings to proposed species or proposed critical habitat.

INFORMAL CONSULTATION

- 1) Informal consultation is an informal procedure that includes all contacts prior to formal consultation. Informal consultation is an optional process.
- 2) Regulations include the use of informal consultation as a way to obtain an exception to formal consultation if the Service concurs in writing with the Federal agency's determination that its action is "not likely to adversely affect" listed species or critical habitat.
- 3) Through this informal process, the Federal agency or non-Federal representative may consult with the Service in developing conservation measures to reduce or eliminate adverse effects of the action. This should be done during the final development stages of the biological assessment.
- 4) If the adverse effects of the proposed activity cannot be significantly reduced or eliminated or incidental take is likely to occur, formal consultation is required.

USE OF THE BEST SCIENTIFIC AND COMMERCIAL DATA AVAILABLE

- 1) The Endangered Species Act and accompanying regulations require the Service to use the best scientific and commercial data available in carrying out Section 7 consultations. The Service routinely advises agencies of the need for obtaining surveys or conducting site specific endangered species surveys to adequately address listed species issues in the biological assessment. While neither the Act nor the regulations require an agency to collect site specific data, it is often in the agency's best interest to do so. Biological assessments that lack site-specific surveys require the Service to consider the "worst case scenario" and "err in favor of the species" when preparing consultations. This situation could push a proposed action nearer to the "jeopardy threshold."
- 2) Because of the affinity of the spotted owl and marbled murrelet to specific habitat types, and the subsequent potential for incidental take, the Service strongly recommends that surveys be conducted for these two species. Survey protocol has been established for both species and may be obtained from the Service.
- 3) Surveys protocols for other species, such as wintering bald eagles, have not been established; however, standard survey techniques should be followed. While the Service will not design a survey or study proposal for a biological assessment, we are willing to review and critique study design.

SECTION 7 OF THE ENDANGERED SPECIES ACT – UNDERSTANDING THE PROCESS

Section 7 of the Endangered Species Act (ESA) requires all federal agencies to consult with the U.S. Fish and Wildlife Service (Service) if they determine that any action they fund, authorize, or carry out may affect a listed species or designated critical habitat. The section 7 consultation process involves six primary components:

- **Species Lists** – A request for a species list is mandatory for major federal actions, unless the agency sends the Service its own list for concurrence. The Service will concur with a submitted list or will provide a list that identifies listed, proposed, and candidate species or critical habitat that may occur in the vicinity of the project. Potential impacts to these species should be evaluated in a biological assessment.
- **Conferences** – required for federal actions likely to jeopardize the continued existence of a proposed species or adversely modify proposed critical habitat. “Jeopardy” and “adverse modification” are defined in the section 7 regulations (50 CFR -02)
- **Early Consultations** – optional and used to reduce the likelihood of conflict between listed species or critical habitat and a proposed project. Early consultation occurs prior to the filing of an application for a federal permit or license.
- **Biological Assessments** – a document required for any major construction activity. It analyzes the potential affects of the project on listed species and critical habitat and justifies a particular “effect determination”. “Major construction activity” is defined in the section 7 regulations (50 CFR 402). Please note that federal agencies are responsible for evaluating impacts to listed species from all federal actions, regardless of scope. For actions other than a “major construction activity”, the agency must still evaluate the potential for adverse effects and consult with the Service, if necessary.
- **Informal Consultations** – process to assist federal agencies in determining if formal consultation is required. It is also the process through which federal agencies request Service concurrence with a “not likely to adversely affect” or “no effect” determination.
- **Formal Consultations** – required for federal actions that may adversely affect a listed species or designated critical habitat. Involves the submittal of a Biological Assessment to the Service and the receipt of a Biological Opinion from the Service.

These six components may overlap. For example, a biological assessment may conclude that a proposed activity is “not likely to adversely affect” one listed species but “may adversely affect” another. In this situation, the responsible federal agency would submit the assessment and request Service concurrence with the “not likely to adversely affect” determination through informal consultation. At the same time, however, the agency should also request formal consultation with the Service due to the “may adversely affect” determination.